

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of : Tucholski
 Serial No. : 07/641,394
 Filed : January 15, 1991
 For : BATTERIES WITH TESTER LABEL

#24

Commissioner of Patents and Trademarks
 Attention: Ian A. Calvert, Vice Chairman
 Board of Patent Appeals and Interferences
 Box Interference
 Washington, D.C. 20231

OCT 08 1993

BOARD OF PATENT APPEALS
AND INTERFERENCESSUPPLEMENTAL OBJECTION TO PETITION FOR ACCESS

Applicant has noted the comments of the Petitioner set forth in the Response To Objection For Access mailed to the Office September 15, 1993. While Applicant is in marked disagreement with most of the arguments set forth in this Response To Objection For Access, closer examination of the claims in this application *vis-a-vis* those in the issued patent which forms the basis for the Petition For Access appears to render these arguments moot. This examination, more specifically, shows that at no time was there any prosecution whatever in this application of the invention set forth in the issued patent.

This application, as filed, contained claims 1-44 directed to "a battery" and claim 45 directed to a "process for attaching a label comprised of a tester for a battery to a battery." The Examiner, in the initial Office Action, required a restriction, grouping process claim 45 separately from claims 1-44 drawn to the battery. Claims 1-44 were elected for purposes of prosecution, and process claim 45 was subsequently canceled.

Applicant added claims 46-53 to this application on October 2, 1992. Each of these claims, like original claims 1-44, is drawn to a "battery."

In re application of Tucholski
Serial No. 07/641,394
Page 2

Applicant added additional claims to this application October 22, 1992. These additional claims, numbered 54-70, were copied from United States Patent 5,059,895 granted October 22, 1991, to Cataldi *et al.* These claims were presented for purposes of provoking an interference with the Cataldi *et al.* patent and appropriate Declarations Under 37 C.F.R. §1.608(b) accompanied them. Claims 54-61 were drawn to a "label." Claims 62-70, again, were drawn to a "battery."

Prosecution in this application, to date, has been limited to claims 1-44 drawn to a "battery," no Office Action addressing the merits of patentability having been issued since March 27, 1992. The claims in United States Patent 5,223,003 which forms the basis for the Petition, in contrast, are drawn to "a process for preparing a label." These inventions, obviously, are different whether one looks at the patent claim as a whole, as advocated in Applicant's original Objection, or whether one looks at the claim preamble, as is urged by Petitioner. Regardless of which test is used, no prosecution "was had in the earlier application of subject matter claimed in the patent." M.P.E.P. §103.

In re application of Tucholski
Serial No. 07/641,394
Page 3

The Petition For Access should be denied.

Respectfully submitted,

GARY R. TUCHOLSKI

By: Price, Heneveld, Cooper,
DeWitt & Litton



Randall G. Litton

Registration No. 24 013

695 Kenmoor, S.E.; Post Office Box 2567
Grand Rapids, Michigan 49501
(616) 949-9610

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